48.

SUPREME COURT OF THE UNITED STATES.

No. 66.

MALINDA FOX, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print.
Writ of Error to court of common pleas	1	2
Record of proceedings in court of common pleas	2	3
Indictment	3	3
Motion to quash indictment, and reasons assigned	4	4
Motion overruled—issue joined—jury sworn	4	4
Verdict of jury	5	4
Motion for new trial, and reasons filed	5	5
Motion overruled	6	5
Judgment—clerk's certificate	6	5
Assignment of errors	6	5
Judgment of Supreme court	7	6
Clerk's certificate	8	7
Writ of error to supreme court	9	7
Citation	11	7
Service of citation	12	8
Assignment of errors	13	8

J. & G. S. GIDEON, printers.

Pleas in the Supreme Court of Ohio, within and for the county of Morgan, in said State.

MALINDA FOX,
vs.
THE STATE OF OHIO. } In error.

Be it remembered, that heretofore, to wit: on the 20th day of December, A. D. 1842, came C. B. Goddard, esq., the attorney of the said plaintiff in error, and filed with the clerk of the supreme court of Ohio, within and for said Morgan county, an allowance of a writ of error in this case by the honorable E. Lane, one of the judges of said court, which allowance is in the words and figures following, to wit: "Let a writ of error be issued in this case, returnable in bank forthwith.

E. LANE, *J. S. C.*"

COLUMBUS, *December* 14, 1842."

And thereupon, on the day and year last aforesaid, to wit: on the 20th day of December, 1842, a writ of error was issued out of the court aforesaid, as directed above, which said writ is in the words following, to wit:

THE STATE OF OHIO, *Morgan county, ss:*

To the judges of the court of common pleas within and for said county, greeting:

Because in the record and proceedings, and also in the rendition of judgment, in a certain cause which was lately in our said court before you, wherein the State of Ohio was plaintiff, and Malinda Fox was defendant, error has intervened, as it is said, to the damage of the said Malinda Fox, and we being willing that such error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then, without delay, you send to us, distinctly and openly, under the seal of your court, an authenticated transcript of the record and proceedings aforesaid, with all things concerning the same, and this writ; so that the same being inspected, we may, at the present term of our court in bank, now in session, in the city of Columbus, State of Ohio, cause further to be done thereupon, what of right and according to the laws of the land ought to be done.

Witness the clerk of our said Supreme Court of the State
[L. S.] of Ohio, this 20th day of December, 1842.

JAS. M. GAYLORD, *Clerk.*

And afterwards, the said writ of error, together with a transcript of the record and proceedings in the said case of the State of Ohio against Malinda Fox, were returned to the said court in bank, and filed therein.

Upon which said writ of error is the following endorsement, to wit: an authenticated transcript of the record and proceedings within mentioned, with all things concerning the same, is herewith returned to the court in bank in a certain record to this writ annexed, as within commanded.

Attest: JAS. M. GAYLORD,
Clerk Court Common Pleas.

Record.

THE STATE OF OHIO
vs.
MALINDA FOX. } Indictment for passing counterfeit coin.

Be it remembered, that heretofore, to wit: at a court of common pleas, held at the court house in the town of McConnellsville, in the county of Morgan, State of Ohio, in the 8th judicial circuit of said court, before John E. Hanna, president judge, and Joseph C. Lain, Jesse M. Stone, and William Durbin, associate judges of said court, on the 24th day of November, in the year of our Lord one thousand eight hundred and forty-two, to wit: at the November term of said court, in the year aforesaid, the grand jurors of the State of Ohio, to wit: Amos Hughs, Ira Webber, Daniel Donald, Alfred Morrison, George Ritchey, William Bell 1st, Alexander Jemison, Richard Hatcheson, Worley C. Shugert, James M. Drake, Judiah Higgins, Andrew Vest, John Wilkin, Samuel A. Barker, and Elza Triplett, enquiring of offences in and for Morgan county aforesaid, came into court and brought with them a bill of indictment against the said defendant, Malinda Fox, which said bill of indictment, with the endorsement thereon, is in the words following, to wit:

THE STATE OF OHIO, *Morgan county, ss:*

Court of Common Pleas of the term of November, in the year of our Lord eighteen hundred and forty-two.

The grand jurors of the State of Ohio, enquiring of crimes and offences within and for the body of the county of Morgan aforesaid, on their oath do find and present that one Malinda Fox, late of said county, on the first day of November, in the year of our Lord, eighteen hundred and forty-two, with force and arms, at Malta township, in said county, had in her possession and custody a certain piece of false, base, and counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin currently passing in the State of Ohio, called a dollar; and that she, the said Malinda Fox, the aforesaid piece of forged, base, and counterfeit coin, did then and there put off, pass, utter, and tender in payment as true and genuine with intent one Hy-

man Lazarus then and there to injure and defraud; she, the said Malinda Fox, then and there well knowing the aforesaid piece of coin to be false, base, and counterfeit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

W. J. RAMSEY,
Prosecuting Attorney.

Endorsement: A true bill.

W. C. SHUGERT, *Foreman.*

And afterwards, to wit: on the 25th day of November, in the year and at the term of the court, held at the place and before the judges first above written, the defendant, being demanded of the premises, plead thereto not guilty, and thereupon came the attorney of the said defendant, and moves the court to quash the indictment in this case for the reasons following, to wit:

THE STATE OF OHIO
vs.
MALINDA FOX. } Passing counterfeit coin.

The said Malinda Fox moves the court to quash the indictment in this case, for the following reasons:

1st. That said indictment is bad, because it does not follow the language of the statute in the description of said offence.

2d. That said indictment is insufficient, for that it does not name the kind of a dollar the said Malinda Fox did utter, pass, put off, and tender in payment, whether it was Spanish, Mexican, German, or American, all of which are currently passing in the State.

3d. That said indictment is in other respects loosely and insufficiently drawn.

4th. For duplicity.

E. E. EVANS, *Att'y for deft.*

And afterwards, to wit, on the 26th day of November, in the year and at the term of the court, held at the place and before the judges first aforesaid, on consideration whereof, it is the opinion of the court that the said motion be overruled; thereupon the issue being joined between the said State of Ohio and the said defendant, upon the plea of not guilty as aforesaid, a jury is called and duly sworn and affirmed, to wit: Stewart Goodral, James S. Warren, John Morrison, Thomas Campbell, Levi Collins, Ezra McKee, James Glass, Hugh Smith, Joseph Chambers, David C. Beckwith, Nathan Smith, and John Scott, who, after hearing the evidence and arguments of counsel, do, upon their oaths and affirmations aforesaid, find and say that the said defendant is guilty in manner and form as she stands charged in the indictment; thereupon came the attorneys of the said defendant, and moves the court for a new trial for reasons on file, in the words following, to wit:

STATE OF OHIO
vs.
MALINDA FOX.

And now comes the said defendant, and moves the court for a new trial, for the cause that improper testimony was permitted to go to the jury, and for the cause that it was incompetent for the State to prove what the prisoner has testified before the grand jury, proving her knowledge of the money to be base, for which she was put upon her trial, and because the verdict is contrary to the testimony, and for other good cause.

PARRISH & EVANS, *Att'ys.*

THE STATE OF OHIO
vs.
MALINDA COX. } Passing counterfeit money.

Motion for new trial.

The attorneys allege for a further reason for this motion that they are informed by some of the jury that this cause was decided in the way it is, because the jury did not rely upon the testimony of Velinda Fox, and that since the trial of this cause, they have discovered two important and credible witnesses to corroberate said Velinda in her testimony. (Said witnesses are William Miller and John Hivnor.) They believe they were not discovered until after this cause was submitted to the jury.

PARRISH & EVANS, *Atty's.*

And afterwards, to wit: on the 2d day of December, in the year and at the term of the court held at the place and before the judges first above written, this cause came on to be heard upon the motion of the defendant's counsel for a new trial, for reasons filed heretofore, and was argued by counsel; whereupon, on consideration, it is the opinion of the court that the said motion be overruled; thereupon, the said defendant being in court, it is considered by the court that the said defendant, for such her offence, be confined in the penitentiary of this State at hard labor for the term of three years, and pay the costs of prosecution.

THE STATE OF OHIO, *Morgan county, ss:*

I, James M. Gaylord, clerk of the court of common pleas of said county, do hereby certify that the foregoing is a complete record of the case of the State of Ohio against Malinda Fox.

In testimony whereof, I do hereunto subscribe my name,
[L. S.] and affix the seal of said court at McConnellsville, this 20th day of December, A. D. 1842.

JAMES M. GAYLORD, *Clerk.*

The following is a copy of the assignment of errors filed in this case, and attached to the record, to wit:

And now comes the said Malinda Fox, by Goddard and Converse, her attorneys, and saith that, in the record and proceedings aforesaid, and in the rendition of said judgment, there is manifest

error in this, to wit: that the judgment aforesaid was rendered in favor of the said State against the said Malinda, when by the law of the land the same should have been rendered in favor of the said Malinda and against the said State of Ohio. And that there is error also in this, that the said court possessed no jurisdiction to try and punish said offence; and that there is error also in this, that the said indictment is insufficient; wherefore, and for other errors in the said record apparent, the said Malinda prays the court that the judgment aforesaid be reversed and held for naught, and that she be restored to all she had lost thereby.

GODDARD & CONVERSE,
Att'ys for plaintiff in error.

And afterwards, to wit: on the 4th day of January, A. D. 1843, a certified copy of the entry made in this case in the court in bank was received and duly entered upon the journal of said supreme court, within and for the county of Morgan and State aforesaid, which said entry is in the words following, to wit:

Court in bank, December term, A. D. 1842.

MALINDA FOX
vs.
THE STATE OF OHIO. } In error.

Reserved from the county of Morgan.

The court having seen and inspected the record and proceedings of the court of common pleas of said Morgan county, are of opinion that in the said record and proceedings, and in the rendition of said judgment, there is no error. It is, therefore, considered by the court that the judgment aforesaid be affirmed, and that the defendant in error recover of the plaintiff in error its costs taxed at dollars. And it is ordered by the court, that the clerk of this court enter on the record of the proceedings in this case, that in the said case there was drawn in question the validity of the twenty-eighth section of the statute of the State of Ohio, passed 7th March, 1835, entitled an act providing for the punishment of crimes, on the ground that the said section was repugnant to the constitution and laws of the United States, and that the decision of this court was in favor of the validity of the said statute of the State of Ohio. Ordered, that a special mandate be sent to the court of common pleas to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the clerk of the supreme court of Morgan county for entry, &c.

THE STATE OF OHIO, *ss:*

I, Lyne Starling, jr., clerk of the court in bank of the State of Ohio, certify that the foregoing entry is truly and correctly copied from the journal of the proceedings of said court.

Witness my hand and the seal of said court at Columbus,
[L. S.] this 28th day of December, A. D. 1842.

L. STARLING, jr., *Clerk.*

THE STATE OF OHIO, *Morgan county, ss:*

I, James M. Gaylord, clerk of the supreme court of Ohio, within and for said county of Morgan, do hereby certify that the foregoing is a true copy of the record, with all things touching the same, in the case of Malinda Fox against the State of Ohio.

In testimony whereof, I do hereunto subscribe my name, [L. s.] and affix the seal of said court, at McConnellsville, this 5th day of January, A. D. 1843.

JAS. M. GAYLORD,
Clerk S. Co. Morgan co. Ohio.

"The United States of America to the honorable the judges of the supreme court of the State of Ohio, in the county of Morgan, in the State of Ohio, greeting:"

Whereas, in the record and process, and also in the rendering judgment in a certain criminal action by indictment, which was in the said court, between the State of Ohio, plaintiff, and Malinda Fox, defendant, manifest error hath intervened, as it is said, to the great damage of the said Malinda Fox, as by complaint we are informed; and we being willing that the error aforesaid, if any, be corrected, and full and speedy justice be done in this behalf to the said parties, command you, that the record, process, and judgment aforesaid, with all things touching the same, under your seals, distinctly and plainly, without delay, you send and certify to the judges of the Supreme Court of the United States on the first day of the next term of said court, so that the judgment aforesaid being inspected, the court may further, for correcting the error aforesaid, do that which of right and according to law ought to be done.

Witness the honorable Roger B. Taney, chief justice of the United States of America, this 28th day of December, in [L. s.] the year of our Lord one thousand and eight hundred and forty-two, and in the 67th year of the American independence.

Attest: WM. MINER, *Clerk.*

I allow a writ of error in this case.

JOHN McLEAN,
Justice Supreme Court, U. States, 7th circuit.
December 28, 1842.

Jan. 5, 1843.

In obedience to the within writ, the said record is herewith returned.

JAS. M. GAYLORD, *Clerk.*

THE UNITED STATES OF AMERICA.

Supreme Court of the United States to the State of Ohio, greeting:

Whereas Malinda Fox obtained the allowance of our writ of error to the circuit court of the United States for the seventh cir-

cuit and district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington, on the second Monday in the month of January next, the record of a certain plaint, process, proceedings, and judgment, in an action by indictment, wherein you, the said the State of Ohio, in that action lately recovered against the said Malinda Fox and costs, as by the said record in the said circuit court and district aforesaid remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Malinda Fox, we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be. You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the second Monday in the month of January next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the honorable Roger B. Taney, chief justice of the United States of America, this 28th day of December, in [L. s.] the year of our Lord one thousand eight hundred and forty-two, and in the 67th year of the American Independence.

Attest: JOHN McLEAN,
Justice Sup. Court U. States, 7th circuit.

COLUMBUS, *28th December*, 1842.

I acknowledge service of the within citation.
WILSON SHANNON,
Governor of Ohio.

January 4th, 1843.

I acknowledge service of the within citation.
W. J. RAMSEY,
Prosecuting Attorney for the county of Morgan and State of Ohio.

And now comes the said Malinda Fox, by Goddard and Convers, her attorneys, and saith, that in the record and proceedings aforesaid, and in the rendition of said judgment, there is manifest error, in this, to wit: that the judgment aforesaid was rendered in favor of the said State against the said Malinda, when by the law of the land the same should have been rendered in favor of the said Malinda and against the said State of Ohio. And that there is error also in this, that the said Supreme Court of the State of Ohio affirmed the judgment of the said court of common pleas. Wherefore, and for other errors in the said record apparent, the said Malinda prays the court that the judgment aforesaid be reversed and held for naught, and that she be restored to all she has lost thereby.

GODDARD & CONVERS.

Filed 13th Jan'y, 1843.

SUPREME COURT OF THE UNITED STATES.

No. 80.

JAMES WOOD, PLAINTIFF IN ERROR,

vs.

WILLIAM A. UNDERHILL AND ASCHEL H. GEROW.

IN ERROR TO THE CIRCUIT COURT UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error,	1	2
Answer of judges,	2	2
Clerk's certificate,	3	2
Citation and return	4	3
Narr.	5	4
Imparlance,	14	8
Plea and notice,	15	8
Venire,	22	12
Exceptions,	23	12
Verdict of jury,	24	13
Judgment,	24	13

J. & G. S. Gideon, Printers.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the [L. S.] circuit court of the United States, for the southern district of New York, second circuit, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between James Wood, plaintiff, and William A. Underhill and Aschel H. Gerow, defendants, a manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this second Monday, of *Monday*, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States, the

J. W. METCALF,
Clerk of the circuit court of the United States, for the southern district of New York, in the second circuit.

The answer of the honorable Smith Thompson and Samuel R. Betts, judges of the circuit court of the United [States,] for the southern district of New York, in the second circuit, to the within writ, containing the record and other proceedings in the within mentioned cause, as appears by the schedules hereunto annexed.

Attest, J. W. METCALF.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, James W. Metcalf, clerk of the circuit court of the United States of America, for the southern district of New York, second circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals, on file, and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, second circuit, this eleventh [L. S.] day of January, in the year of our Lord one thousand eight hundred and forty-three, and of the independence of the said United States the sixty-seventh.

J. W. METCALF, *Clk.*

By the honorable Smith Thompson, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit—

To William A. Underhill and Aschel H. Gerow:

Whereas James Wood, plaintiff in error, has lately issued out of the Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the United States, for the southern district of New York, in the second circuit, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between James Wood, plaintiff, and William A. Underhill and Aschell A. Gerow, defendants, a manifest error hath happened to the great damage of the said James Wood.

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held at the city of Washington, on the second Monday of January next, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said second Monday of January next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the eighth day of December, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-seventh.

SMITH THOMPSON.

I acknowledge due service of the above citation of the defendants in the above entitled cause, dated 10th day of February, 1843. R. ROWLEY, *Defts' Atty.*

UNITED STATES CIRCUIT COURT:

Placita.

Pleas in the circuit court of the United States, held in the southern district of New York, in and for the second circuit in the city of New York, on the ninth day of September, in the year one thousand eight hundred and forty-two, before the honorable Smith Thompson, one of the circuit judges.

Memorandum.

Be it remembered that heretofore, to wit, on the second day of August, in the year aforesaid, before the judge aforesaid, came

James Wood, by William Silliman, his attorney, brought then there his certain bill against William A. Underhill and Aschel H. Garow, in custody, &c., of a plea of trespass in the case, &c. &c., and which said bill follows in these words, to wit:

Circuit Court of the United States for the southern district of New York, second circuit, of the fifteenth July, in the year of our Lord one thousand eight hundred and forty-two.

Narr.

SOUTHERN DISTRICT OF NEW YORK,
City and county of New York, ss:

James Wood, plaintiff in this suit, by William Silliman, his attorney, complains of William A. Underhill and Aschel H. Garow, defendants in this suit, being in custody, &c., of a plea of trespass on the case, &c. &c.

For that, whereas, before and at the time of making the letters patent as hereinafter mentioned, the said plaintiff was the true and original inventor of a new and useful improvement in the art of manufacturing brick and tile, to wit, on the 9th day of November, in the year of our Lord 1836, to wit, at the first ward of the city of New York, and within the district aforesaid, and such proceedings were had heretofore, to wit, on the 2d day of December, in the year of our Lord 1836, upon the application of the said plaintiff that letters patent under the seal of the United States, bearing date the day and year last aforesaid, signed by John Forsyth, then Secretary of State of the United States, and countersigned and sealed with the seal of the patent office, by Henry L. Ellsworth, the commissioner of patents, were duly issued and tested according to the form of the statute in such [case] made and provided, wherein and whereby it was recited that James Wood, of the county of Rockland, New York, had invented a new and useful improvement in the mode of making brick, tile, and other clay ware, for which letters patent were granted, dated the 3d day of March, 1829, which letters patent were thereby cancelled on account of a defective specification which he stated had not been used or known before his application; had made oath that he was a citizen of the United States; that he did verily believe that he was the original and first inventor or discoverer of the said improvement; and that the same has not, to his knowledge and belief, been previously known or used—had paid into the Treasury of the United States the sum of fifteen dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent might be granted for that purpose; and by which letters patent there was granted according to law, the said plaintiffs, James Wood, his heirs, administrators, and assigns, for the term of fourteen years, from the 3d day of March, 1829, the full and exclusive right and liberty of making, constructing, using,

and vending to others to be used, the said improvement; which letters patent were in language of the following import, and to the following effect, to wit:

No. 97.

The United States of America, to all to whom these presents shall come:

Whereas James Wood, of the county of Rockland, New York, has alleged that he has invented a new and useful improvement in the mode of making brick, tile, and other clay ware, for which letters patent were granted, dated 3d day of March, 1829; which letters patent are hereby cancelled on account of a defective specification, which, he states, has not been known or used before this application, has made oath that he is a citizen of the United States; that he does verily that he is the original and first inventor and discoverer of the said improvement, and that the same had not, to his knowledge and belief, been previously known or used; had paid into the Treasury of the United States the sum of fifteen dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent might be granted for that purpose. These are, therefore, to grant, according to law, to the said James Wood, his heirs, administrators, or assigns, for the term of fourteen years, from the 3d day of March, 1829, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, *of* description whereof is given, in the words of the said James Wood, in the schedule hereto annexed, and is made a part of the presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the patent office has been hereto affixed.

Given under my hand, at the city of Washington, this 2d day of December, in the year of our Lord one thousand eight [L. S.] hundred and thirty-six, and of the independence of the United States the sixty-first.

JOHN FORSYTH,
Secretary of State.

Countersigned and sealed with the seal of the patent office.

HENRY [L.] ELLSWORTH,
Commissioner of Patents.

To which letters patent was annexed, and making part of the same a specification, in which said invention and improvement are fully and correctly set forth and described, in language of the following import, and to the following effect, to wit:

The schedule referred to in these letters patent, and making part of the same:

To all whom these presents shall come, James Wood, of the county of Rockland, in the State of New York, of the United

States, send greeting: Be it known that I, the said James Wood, have invented a new and useful improvement in the art of manufacturing bricks and tiles—the process is as follows: Take of common anthracite coal, unburnt, such quantity as will best suit the kind of clay to be made into brick or tile, and mix the same, when well pulverized, with the clay before [it] is moulded; that clay which requires the most burning will require the greatest proportion of coal dust; the exact proportion, therefore, cannot be specified; but, in general, three-fourths of a bushel of coal dust to one thousand brick will be correct. Some clay may require one-eighth more, and some not exceeding a half bushel. The benefits resulting from this composition, are the saving of fuel, and the more general diffusion of heat through the kiln, by which the whole contents are more equally burned. If the heat is raised too high, the brick will swell, and be injured in their form. If the heat is too moderate, the coal dust will be consumed before the desired effect is produced—extremes are therefore to be avoided. I claim as my invention the using of fine anthracite coal, or coal dust, with clay, for the purpose of making brick and tile as aforesaid, and for that only claim letters patent from the United States.

JAMES WOOD.

Dated 9th November, 1836.

Witnesses—W. SILLIMAN,
JAUMEY W. TROULMAN.

Endorsed on which said letters patent are these words, to wit: Patent office. Rec'd June 29th, 1837, and recorded anew in this office.

HENRY L. ELLSWORTH,
Commissioner of Patents.

As by the said letters patent, and the specifications thereunto annexed, ready in court to be produced, will, reference being thereunto had, fully and at large appear. And the said plaintiff saith that the facts stated in the said patent and specification, and in the endorsement thereon, are true, and that the said plaintiff then and there became the owner of the said patent, and of all the rights thereto and therein secured to the patentee, and that the said plaintiff saith that he, the said plaintiff, hath always, from the time of making and granting of the said letters patent as aforesaid, hitherto, by himself, his servants, deputies, and agents in that behalf, made, used, and exercised and enjoyed and vended his invention, to wit, at New York and within the district aforesaid, to his great advantage and profit. Yet the said defendant, well knowing and contriving and wrongfully and injuriously to injure the said plaintiff, and to deprive him of the profits, benefits, and advantages which he might and otherwise would have derived from the making, using, exercising, and vending of the said invention after the making of the said letters patent,

and within the said term of years in the said letters patent mentioned, to wit, on or about the 3d day of December, in the year 1836, and at divers other days, and every day between that day and the day of the commencement of this suit, to wit, at New York and within the district aforesaid, unlawfully and unjustly, without the leave or license, and against the will of the said plaintiff, made, constructed, used, and sold the said improvement in the said letters patent and specification described, to wit, in the manufacture of one hundred millions of bricks and one hundred millions of tiles; and in manufacturing the said bricks and tiles the said defendant took of the common anthracite coal, unburnt, such quantity as would best suit the kind of clay of which such bricks and tiles were made, and mixed the same, when well pulverized, with the said clay before the same was moulded, and used such proportion of the dust of such coal as is specified in said specification, to wit, three-fourths of a bushel of such dust to one thousand of said bricks, and a like proportion to said tiles, whereby the said defendant obtained great benefit and advantage in the saving of fuel in the burning of said bricks and tiles, and whereby he caused said bricks and tiles to be more rapidly and equally burnt than by the processes before in common use. And by the violation of said patent, in manner aforesaid, the said defendant gained a large benefit and advantage to himself, to wit, the amount of one dollar on each [and] every thousand of the bricks and tiles so made by him as aforesaid. All which doings of said defendant, and in breach of said letters patent, and in violation and infringement of the rights, liberties, and privileges so as aforesaid belonging to the said plaintiff, and contrary to the form and effect of the statute in such case made and provided, whereby the said plaintiff hath been and is greatly injured and deprived of great profit, which he might and otherwise would have derived and acquired from the said inventor, to wit, at New York and within the district aforesaid.

And the said plaintiff further saith that the said plaintiff so being such inventor as aforesaid, and the said letters patent having been so made as aforesaid, and the said specification thereto annexed, making part of the same, and the said invention having been so made and exercised and vended by the said plaintiff as aforesaid, the said defendants, William A. Underhill and Aschel H. Gerow, well knowing the premises, but further intending and contriving as aforesaid, after the making of the said letters patent and of the said specification, and within the said term of years in the said letters patent mentioned, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the day of the commencement of this suit, to wit, at New York and within the district aforesaid, unlawfully and unjustly, and without leave or license, and against the will of the said plaintiff, made divers, to wit, one hundred millions of bricks, and hundred millions of tiles, by taking of the common anthracite coal, unburnt, such quantity

as would best suit the kind of clay by him to be made into bricks and tiles, and mixing the same, when *when* well pulverized, with clay, before the same was moulded, to wit, three-fourths of a bushel of coal dust, or some other proportion, for each and every thousand of said bricks and tiles, and the said defendant did then and there mix anthracite coal dust with clay for the purpose of mixing the said bricks and tiles, by means whereof he obtained a great saving of fuel in the burning of the said bricks and tiles, and a more general diffusion of heat through the kiln, by which the whole contents were more equally burnt, and the process of burning of said bricks and tiles was accelerated by the use of the coal dust aforesaid; and the said defendant did, at the place and at the several times aforesaid, make one hundred millions of bricks, and one hundred millions of tiles, in the manner and with the benefits and advantages described in the said patent and specifications.

All which acts of the said defendants are in violation of the rights of the said plaintiff conferred by the said letters patent, and contrary to the form of the statute in such case made and provided, whereby the said plaintiff hath been and is greatly injured, and hath lost and been deprived of divers great gains and profits which he might and otherwise would have derived and acquired from the said invention, to wit, at New York and within the district aforesaid.

By means of all which the said plaintiff says that he has sustained actual damage to the sum of ten thousand dollars, whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to have and recover of and from the said defendants the sum of thirty thousand dollars, being three times the actual damages sustained by the said plaintiff as aforesaid. Yet the said defendants, although often requested by the said plaintiff, hath never paid the same, or any part thereof, to the said plaintiff; the said defendants hath hitherto wholly refused, and still *does* refuse, to the damage of the said plaintiff fifty thousand dollars; and therefore he brings suit, &c.

Imparlance.

And now, at this day, that is to say, the ninth day of September, in the year one thousand eight hundred and forty-two, until which day the said defendants to the said declaration had leave to imparle, and then and there to answer the same, at the city hall, in the city of New York aforesaid, before the judge aforesaid, come as well the said plaintiff, by his attorney aforesaid, as the said defendants, by Reuben Rowley, their attorney.

Plea and notice.

And the said William A. Underhill and Aschel H. Gerow, the above defendants, by Reuben Rowley, their attorney, come and defend the wrong and injury, when, &c., and say that they are not guilty of the premises above laid to their charge, in manner and

form as the said James Wood has above thereof complained against them, and of this they put themselves upon the country, and the said James Wood doth like, &c.

Sir, take notice that the abovenamed defendant, at the trial of this cause, will prove and give in evidence in bar of the plaintiff's right of action, that the specification of the pretended invention and improvement annexed to, and making part of, the letters patent granted to the said plaintiff, bearing date the second day of December, in the year one thousand eight hundred and thirty-six, signed by John Forsyth, then Secretary of State of the United States, and countersigned and sealed with the seal of the patent office by Henry L. Ellsworth, Commissioner of Patents, was not sufficiently definite and explanatory to enable other persons of competent skill to make brick, tile, or other clay ware, by following the directions therein given; that said specification is altogether vague and indefinite—so much so that the same conveys no information whatever, and that no person, however competent his skill might be, could take said specification and burn or make brick, tile, or other clay ware, by following the directions therein given. And you will further take notice, that the said defendants, at the trial of the said cause, will prove and give in evidence, in bar of the said plaintiff's right of action as aforesaid, that the said pretended invention and improvement in the mode of making bricks, tile, and other clay ware mentioned in the said letters patent and specification thereunto annexed, in the said plaintiff's declaration set forth, by mixing coal, unburnt and well pulverized, with clay before moulding the same into bricks, tile, or other clay ware, for the use or mixture of which by the defendants without license this suit was brought, had been known, used, and practised in the same manner; the said defendants used and practised the same previous to the alleged invention of the said plaintiff, to wit, in the vicinity of London, in England, and also in the principality of Wales, in England, upwards of thirty years ago; and also that the said pretended improvement of the said plaintiff was known and used by one William Smith, at the city of Montreal, in the province of Lower Canada, and by John Boucket, by William Frape and Joseph Frape, in the parish of Doerly, in the county of Gloucester, in England; and also by one Aubury, at Carmarthen, in South Wales, England; and also by Joseph Robinson, at Leeds, in England; also by John Bennet, at Birmingham, in England; also by Thomas Plummer and John Serrel, at Camberwell, near London, in England; also by Samuel Wood, at Tottenham Court Road, in London, before the application of the said plaintiff for said letters patent, or the granting thereof to him; and that said William Smith, John Boucket, William Frape, Joseph Frape, Joseph Robinson, John Bennet, Thomas Plummer, and John Serrell, and the said Aubury and Samuel Wood, of the respective places above mentioned, were well acquainted with the mode of making, and have been in the habit of using bi-

tuminous coal and common anthracite coal, and other kinds of mineral coal, in manufacturing bricks, tile, and other clay ware, in the manner pretended to have been invented by the said plaintiff, at the several places aforesaid, respectively, in England, and at Montreal aforesaid, before the issuing of, or application for, the said letters patent to *or* the said plaintiff.

And the said defendants will further prove and give in evidence as aforesaid, that the pretended invention of the said plaintiff, mentioned and set forth in the said letters patent and specification contained in the said declaration of the said plaintiff is not a new discovery; that the method of using pulverized bituminous coal, or any other combustible mineral substance, in the manufacture of bricks, tile, or other clay ware, by mixing the same with clay, was well known to the said William Smith, Joseph Boucket, William Frape and Joseph Frape, Joseph Robinson, John Bennet, Thomas Plummer, and John Sorrel, Auburn and Samuel Wood, at the respective above mentioned, at said places respectively, before the making of the application of the said plaintiff for the said letters patent; that various kinds of bituminous coal had been used in the manufacture of brick, tile, and other clay ware, by pulverizing such coal and mixing it with clay in the manner mentioned in the said specification annexed to the said letters patent, long before the issuing of said letters patent; that the combustible properties of common anthracite coal, and the effects produced by combination thereof, are similar to various kinds of bituminous coal, and that the properties and quantities of common anthracite, and the effects produced by combination thereof, are well and generally known and understood by and among scientific men, and by the community in general at Pittsburgh and Philadelphia, in the State of Pennsylvania, at the city of New York, and many other places in the United States, and elsewhere; and also that the said improvement so as aforesaid pretended to have been invented by the said plaintiff, had been patented in England, Holland, Germany, and other foreign countries, before the time of the granting of the said letters patent to the said plaintiff, or application being made therefor; and also that the said method of mixing mineral coal, well pulverized, with clay, as mentioned in the said specification annexed to said letters patent, set forth in said declaration, had been known and used, and actually described in various printed publications in England, Germany, and elsewhere, before the granting of said letters patent to the said plaintiff, in the application of the said plaintiff therefor.

And the said defendant will further prove and give in evidence aforesaid, that the said plaintiff was not the original and first inventor or discoverer of the improvement in the art of manufacturing bricks and tile, in the plaintiff's declaration described and set forth. Also that the improvement in the art of manufacturing bricks and tile in the plaintiff's declaration described, namely: by mixing pulverized anthracite coal, or coal dust, with the clay before mould-

ing the same into bricks or tile, was known before the application of the said plaintiff for the said letters patent therefor, or the granting thereof to him *to* William Derry, formerly a resident of Leicester county, England, but who now resides in Haverstram, Rockland county, New York, *who* the same used by John Bennet, at Birmingham, England, as hereinbefore mentioned; and also by George Brereton, formerly a resident of Carmarthen, in South Wales, in England, who saw the same used by one Aubury, at the place last mentioned, but now of Brooklyn, New York; and also by Samuel Morgan, formerly a resident of the parish of Dorsly, in the county of Gloucester, England, but now of Marlborough, Ulster county, New York, who saw the same used by William Frape and Joseph Frape, and John Boucket, at the parish of Dorsly, England; and also by Jeremiah Wood, formerly a resident of the city of London, England, but now resides in the city of Troy, New York, who saw the same used by Samuel Wood, at Tottenhan Court Road, in London as aforesaid; and also by Thomas Walker, during the years 1826, 1827, and 1828, at a place called Milltown, in the town of New Brunswick, in the State of New Jersey, where the said Thomas Walker then resided, and manufactured bricks according to the method in the said specification annexed to said letters patent, in the said plaintiff's said declaration mentioned and described, and the said Thomas Walker is now a resident of Kirkirville, in the town of Wagon, Licking county, and State of Ohio.

And also will prove and give in evidence, that the use of bituminous and other coal, in the manner pretended to have been invented or discovered by the said plaintiff, was known prior to the application of the said plaintiff for letters patent for his said pretended improvement to George Robinson, formerly a resident of Bedfordshire, England, but now residing at Hudson, Columbia county, New York, who knew of the use thereof by Joseph Robinson, of Leeds, in England; and also to William Serrell, formerly a resident of the city of London, England, but now of the city of New York, who knew of the use thereof by Thomas Plummer and John Serrell, as herein before stated, at Camberwell, near London. And the said defendants will further prove and give in evidence as aforesaid, that the method of using anthracite coal or coal dust, in the particular manner mentioned in the specification annexed to the said letters patent as in said declaration set forth, was known prior to the said plaintiff's acquiring knowledge thereof to David Whiting, Richard Low, William P. Alcott, and William T. Smith, of Athens, in the county of Green, and State of New York; and to Lewis Mackey, William S. Holmes, and David Munn, of Haverstraw, Rockland county, New York; and to Jesse Wood, Aaron Norris, and Benjamin D. Gardner, of New Burgh, Orange county, New York; and to Silas Holbrook and Peter Hubbell, of Coxsackie, Green county, New York, and that the same was actually used by the said persons respectfully, at the said places respectively, before the date of the

application of the said plaintiff for the letters patent granted to him on the second day of December, 1836, that is to say, before the ninth day of November, 1836. And also that, at the time of the granting of the original letters patent to the said plaintiff, as in the said declaration mentioned, the said plaintiff had not discovered the proportion of coal to be used, or the particular kind of coal he used, or reduced the art to practice, as mentioned and described in the amended specification in said declaration set forth; but that the proportion of coal, and the kind of coal to be used, was known to the several persons last mentioned; and that the said Nathaniel Adams, between the time of the granting of the original letters patent to said plaintiff, and the surrendering thereof and granting of the said letters patent in said declaration set forth, obtained a patent to him, the said Nathaniel Adams, from the United States, for the same improvement described in the letters patent to the said plaintiff in the declaration set forth.

Venire.

Therefore to try the said issue, so as aforesaid joined, between the parties aforesaid, let there come a jury thereof, before the judge aforesaid, at the city hall, in said city of New York, on the fifth day of December, in the year aforesaid, twelve, &c., each of whom, &c., by whom, &c., and who neither, &c., to recognise, &c., become as well, &c., the same day is given to the parties here, &c.

Postea.

At which said day, before the judge aforesaid, at the place aforesaid, come, as well the within named plaintiff, as the said defendant, by their respective attorneys aforesaid. And the jurors of the jury, whereof mention is within made, being summoned, also come.

Copy exceptions.

"And, upon the trial of the cause, the plaintiff to prove and maintain his action, introduced, and read in evidence, the patent and specification set out in the declaration; and thereupon the defendant objected to the sufficiency of the patent to sustain the action, but that the same was void upon the face of it."

"Because, in the specification, no certain proportion for the mixture is pointed out, but only that such quantity of coal must be taken as will best suit the kind of clay to be made into brick or tile; but that clay, which requires most burning, will require the greatest quantity of coal dust; the exact proportion cannot, therefore, be specified; but, in general, three-fourths of a bushel of coal dust to one thousand brick will be correct. Some clay may require one-eighth more, and some not exceeding half a bushel; so that there is no fixed rule by which the manufacturer can make the mixture, but that must be ascertained by experiments upon the

clay; and the claiming clause in the specification is only for the abstract general principle of mixing anthracite coal dust with clay, for the purpose of making brick, without any practical rule as to the proportions, which is too vague and uncertain to sustain a patent; which objection was sustained by the court. To this decision of the court the plaintiff excepted.

And the jury found a verdict for the defendants.

Signed, SMITH THOMPSON, [L. S.]

Postea resumed.

And the jurors of the jury aforesaid, to speak the truth of the matters within contained, being chosen, tried and sworn, say, upon their oath, that the said William A. Underhill and Asahel H. Gerow, are not guilty of the premises within laid to their charge, in manner and form as the said James Wood hath within complained against them.

Ideo consideratum est.—Judgment, 9th 1843.

Therefore, it is considered by the said court that the said James Wood take nothing by his bill, but that he be, in mercy, &c.; and that the said William A. Underhill and Asahel H. Gerow do go thereof, without day, &c. And it is further considered that the said defendants do recover against the said plaintiff further cost and charges, by them laid out about their defence in that behalf, by the court now here adjudged to the said defendants, with their consent according to law, the sum of two hundred dollars and fifty-seven cents, and that the said defendants have execution thereof, &c.

Signed, J. W. METCALF, *Clerk.*

February,

CIRCUIT COURT OF THE UNITED STATES:

JAMES WOOD
vs.
WILLIAM A. UNDERHILL and
ASAHEL H. GEROW.

It is agreed that the defendants make up the judgment record, embracing the bill of exceptions, which has been signed, within ten days from the date hereof, or the plaintiff, at the expiration of that time, be at liberty to make up and file the same, to the end that the same may be returned with the writ of error in this cause; and that either party be at liberty to bring on the hearing of this cause, on the writ of error therein, on or after the third Monday of February next.

W. SILLIMAN, *Attorney for pl'tff.*
R. ROWLEY, *Defdts' attorney.*

Dated, NEW YORK, 17*th January*, 1843.

Filed,